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ARTICLE

OMBUDS AS NOMADS? THE INTERSECTIONS OF DISPUTE SYSTEM DESIGN AND IDENTITY

TIMOTHY HEDEEN*

*One's destination is never a place, but
rather a new way of looking at things.*

—Henry Miller, 1957¹

ABSTRACT

Whether providing requested information, careful attention, informal coaching, impartial mediation, or upward feedback, ombuds² operate within an “oscillating space”³ occasioned by contending purposes of their work. Their relationships to both their visitors and their host organization confer a dynamic identity, as they are at once supporting the visitor and supporting the organization. With which does an ombudsman identify, their organization or their visitor? Can the answer be both? This article will explore the opportunities and challenges arising from this tension.

INTRODUCTION

The structure and work of organizational ombudsman offices vary widely. Whether staffed by one or more full- or part-time employees, serving constituents internal or external to the organization, ombuds offices deliver a range of services that are often otherwise unattended to, or unaccounted for. Ombuds typically receive “visitors” who seek one or more

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1. HENRY MILLER, *BIG SUR AND THE ORANGES OF HIERONYMUS BOSCH* 25 (1957).

2. The term *ombudsman* has origins in Scandinavian languages, where it apparently does not have a gendered meaning. Contemporary usage in the United States includes *ombudsman* alongside gender-neutral terms *ombudsperson* and *ombuds*, and this paper will employ the latter. Confusingly, *ombuds* is both the singular and plural form of this noun.

3. Andrew Woolford & R.S. Ratner, *Nomadic Justice? Restorative Justice on the Margins of Law*, 30 Soc. JUST. 177, 188 (2003).

of the following: to relate their concerns privately, to be heard by a supportive or unaligned person, to learn of relevant policies, to make sense of their experience, to receive coaching or guidance about how to proceed in a difficult situation, or to access assistance in resolving differences. Ombuds often play a role in organizational learning through privately receiving information that would otherwise not be shared, summarizing it as upward feedback (in which themes of organization-level concern are brought to the attention of specified leadership), and support of groups within the organization, in the form of training, facilitation, or mediation among colleagues within teams or departments.

A relatively young and small field of practice, the organizational ombuds community is served by a single international association, which provides the field's most widely-recognized training and certification, as well as standards of practice and professional ethics. The preamble to the International Ombudsman Association (IOA) Code of Ethics concludes, "The Ombudsman shall be truthful and act with integrity, shall foster respect for all members of the organization he or she serves, and shall promote procedural fairness in the content and administration of those organizations' practices, processes, and policies."⁴ The Code sets forth four ethical principles—independence, neutrality and impartiality, confidentiality, and informality—which are elaborated in the organization's Standards of Practice.⁵

Theories of social identity highlight some unique challenges and delicate dynamics facing an organizational ombuds. Leaders in the evolution of the field have reflected on their work and noted, "[t]he organizational ombudsman is an odd duck—perhaps the only professional manager within an organization whose role does not include 'representing' the organization. The ombudsman is meant to be independent while being a part of the organization. . . . The [organizational ombudsman] shares with others a commitment to the mission and values of the organization [she] serves, yet [her] loyalty to the organization has to be subservient to principles of fairness and impartiality."⁶ Further, the organizational ombuds is to be careful to remain unaligned with visitors, as per Standard 2.2: "The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably ad-

4. *IOA Code of Ethics*, INT'L OMBUDSMAN ASS'N, http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf (last visited Jan. 29, 2016).

5. *IOA Standards of Practice*, INT'L OMBUDSMAN ASS'N, http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf (last visited Jan. 29, 2016).

6. Mary Rowe & Howard Gadlin, *The Organizational Ombudsman*, in *THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS* 210, 210–11 (William K. Roche et al. eds., 2014).

ministered processes and does not advocate on behalf of any individual within the organization.”⁷

How an ombuds might navigate between and among these standards, their visitors, and their host organization is neither simple nor static. This paper explores the intersections of ombuds practice and identity theories, seeking to understand more clearly the organizational ombuds’ perpetually dynamic role. Opening with a brief overview of the organizational ombuds origins and functions, the paper turns to discussion of relevant sociological theories before applying these to the ombuds position—one which appears consigned to constant motion.

THE ORIGINS OF ORGANIZATIONAL OMBUDS

The title *ombudsman* is often traced to Sweden, where the 1809 Constitution provided for a “*Justitieombudsman*”, an office to “supervise the observance of laws and statutes.”⁸ The Swedish Parliament would elect “a person of known legal ability and outstanding integrity. . . [who] not only could investigate allegations of official wrongdoing but was authorized to prosecute officials”⁹—those who “committed an unlawful act or neglected to perform official duties properly.”¹⁰ The evolution of the governmental role within Sweden, including the creation of an ombuds role related to military conduct during World War I, as well as expansion into neighboring Finland, Norway, and Denmark, and beyond in the Twentieth Century is both fascinating and beyond the scope of this paper.¹¹ These offices are described as *classical* ombuds, distinct from *organizational* ombuds. The contemporary classical ombuds office “emphasizes statutory independence from governmental control, the power to investigate complaints, and the authority to publish findings and recommendations.”¹²

The United States’ experience of ombuds was shaped in part by a 1961 law review article rooted in an international search for responsive models of public administration.¹³ The author extolled the virtues of the Scandinavian ombuds offices, concluding that “[m]aybe the general idea is one that we

7. *IOA Standards of Practice*, *supra* note 5.

8. CHARLES L. HOWARD, *THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS* 3 (2010) (construing Gerald E. Caiden, *The Institution of Ombudsman*, in *INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND FUNCTION* 3, 13 (Gerald E. Caiden ed., 1983)).

9. *Id.* at 4.

10. *Id.* (construing Gerald E. Caiden, *The Institution of Ombudsman*, in *INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND FUNCTION* 3, 10 (Gerald E. Caiden ed., 1983)).

11. See Alfred Bexelius, *The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden*, 377 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1968); see also Henry J. Abraham, *A People’s Watchdog Against Abuse of Power*, 20 PUB. ADMIN. REV. 152 (1960); see also WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS’ PROTECTORS IN NINE COUNTRIES* (1967); and see also HOWARD, *supra* note 8.

12. Howard Gadlin, *The Ombudsman: What’s in a Name?* 16 NEG. J. 37, 38 (2000).

13. Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057 (1961).

Americans ought to explore. . . . The idea, coupled with American ingenuity to adapt it to our institutions, may have considerable potentiality for our various governments, federal, state, and local.”¹⁴ Efforts in Congress toward a federal ombuds office failed, but the American Bar Association adopted a resolution in 1969 encouraging state and local governments to consider establishing ombuds offices, and in 1971 revised the resolution to include ombuds at the federal level.¹⁵

Ombuds offices began to appear in non-governmental arenas too, including health care institutions, prisons, non-profit organizations, newspapers, and higher education. In each of these, the animating concern of protecting the individual from institutional excesses was tailored to fit the specific context.¹⁶ “An intra-organizational version of the role emerged, to allow people to raise issues and concerns in their lives as employees, managers, and students, rather than as citizens.”¹⁷ Changes in the social and legal landscapes influenced organizations to attend to individuals’ concerns in new and different ways, whether under pressure from popular movements or the threat of lawsuits. And organizations seeking not only efficiency and innovation were among the first to gather a range of complaint-handling, justice-serving, conflict-responsive services within a single resource, sometimes titled an ombuds office.¹⁸

These organizational efforts ran parallel to those in the United States court system, where newly-won rights were being exercised by many, ranging from those involved in large-scale cases rooted in civil rights to those pressing small-scale cases rooted in no-fault divorce. Pressure on the courts was not confined to the sheer volume of cases, but came also in the form of challenges to the role of courts in society. Seeking “a better way,” Chief Justice Warren E. Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976, from which flowed the beginnings of court-based dispute resolution.¹⁹ At the same time, the popular movements of the 1960s and ‘70s that led to the creation of new laws also represented deep interest in greater autonomy by communities and individuals. Efforts to empower individuals to resolve their own differences took the form of community dispute resolution. These efforts—within and outside the courts—set in motion the contemporary

14. HOWARD, *supra* note 8, at 6 (construing Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1057–58 (1961)).

15. *Id.* at 7.

16. *Id.* at 10.

17. Rowe & Gadlin, *supra* note 6, at 219.

18. *Id.* at 217.

19. Chief Justice Warren E. Burger, Remarks at the American Bar Association Minor Disputes Resolution Conference (May 27, 1977). Justice Burger sprinkled the motif of “a better way” across many addresses and many years, including his comments at the Pound Conference. See Chief Justice Warren E. Burger, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976) (transcript available in the National Center for State Courts).

field of alternative (or appropriate) dispute resolution (“ADR”).²⁰ “In many ways the organizational ombudsman field grew rapidly because it caught the ADR wave.”²¹ Organizational ombuds offices were created to realize the potential value of internal resources to manage conflict and to improve communication. The functions of these offices are both broad and ever-evolving, as demonstrated in the following section.

THE FUNCTIONS OF ORGANIZATIONAL OMBUDS

The contemporary organizational ombuds performs many functions, including a blend of ADR processes. Like most practitioners of ADR, an ombuds typically opens by listening to visitors. Like a conflict coach,²² an ombuds often helps a visitor to clarify her concerns and options. Like a conciliator,²³ an ombuds may facilitate dialogue between parties without convening them; or like a mediator,²⁴ an ombuds may convene them for discussion and decision-making. Like a fact-finder or arbitrator,²⁵ an ombuds may seek and share with visitors relevant policies or standards.

Pioneering practitioners Mary Rowe and Howard Gadlin have assembled a list of “the most basic functions” of organizational ombuds:

- delivering respect, for example affirming the feelings of each person involved in a concern, while staying explicitly neutral on the facts of a case, responding as quickly as possible when called, endeavoring to build some degree of relationship
- active listening, probing respectfully, serving as a sounding board
- providing and explaining information, one on one, for example about policies and rules, and about the *context* of a concern
- receiving vital information, one on one, for example from those reporting unacceptable behavior, criminal and safety violations, and the like
- reframing issues, illuminating the context, and facts and feelings, that might have been overlooked

20. See Timothy Hedeon & Patrick G. Coy, *Community Mediation and the Court System: The Ties That Bind*, 17 *MEDIATION Q.* 351 (2000).

21. Rowe & Gadlin, *supra* note 6, at 221.

22. See TRICIA S. JONES & ROSS BRINKERT, *CONFLICT COACHING: CONFLICT MANAGEMENT STRATEGIES AND SKILLS FOR THE INDIVIDUAL* (2008).

23. See David N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 *AM. J. COM. L. SUP.* 205 (1978).

24. See JENNIFER E. BEER & CAROLINE C. PACKARD, *THE MEDIATOR’S HANDBOOK* 3–11 (4th ed. 2012).

25. Like an arbitrator in seeking relevant precedents, standards, or policies, but *very much unlike* an arbitrator in NOT rendering a decision. For a description and comparison of arbitration, see STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS, & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES* 303–06 (6th ed. 2012).

- helping to develop options, and then helping to evaluate the pros and cons of all the choices for the issues at hand.”²⁶

Importantly they highlight specifically three other sets of functions, grouped as support of visitors’ own action, ombuds’ efforts to address specific concerns, and efforts to address systemic concerns:

Supporting visitors’ own action

- “• offering the option of referrals to other resources—including ‘key people’ in the relevant department, managers and compliance offices, and all relevant support services
- helping people help themselves to use a direct approach, for example helping people to collect and analyze their own information, helping people to draft a letter about their issues, coaching and role playing to help people learn to negotiate and to engage in problem-solving. This is the function of teaching people ‘how to fish’ rather than ‘giving them a fish.’”²⁷

Ombuds’ efforts to address specific concerns

- “• offering shuttle diplomacy, for example helping employees and managers to think through proposals that may resolve a dispute in a fair way, and facilitating discussions, in a back and forth process; helping a manager to review or reformulate a decision
- offering mediation inside the organization, bringing various people together
- ‘looking into’ a problem informally, for example checking for new policies, or resource constraints, checking unobtrusively with staff offices to find out if others have heard about a certain kind of issue
- facilitating a generic approach to an individual problem, for example asking for the law proscribing uncompensated overtime to be enforced throughout a whole division. This may lead to a fair outcome while protecting the identity of an individual who came forward.”²⁸

Ombuds’ efforts to address systemic concerns

- “• providing early warning of issues that are ‘new’ and potentially disruptive to the organization, by getting back to relevant managers in a manner consonant with confidentiality, when the OO sees something unexpected and potentially disruptive
- identifying and communicating about *patterns* of issues, for example reporting to each senior officer on a regular basis about

26. Rowe & Gadlin, *supra* note 6, at 225.

27. *Id.* at 226.

28. *Id.*

what comes to the OO office about his or her domain; writing specific and/or annual reports

- working for systems change, for example suggesting new policies, procedures, and structures, and participating in relevant training about conflict management; serving as a resource person to policy committees; helping to spread good ideas that have popped up somewhere in the organization
- following up on a case with relevant stakeholders, and following up on recommendations made by the OO
- helping informally, and often invisibly, to connect and coordinate all the elements of the conflict management system—in the context of thousands of daily communications with employees and managers. OOs support all cohorts to understand and use all the resources and options in the system.”²⁹

To fulfill all seventeen functions listed, an organizational ombuds must earn and guard jealously the trust of the ombuds’ constituents. Studies of trust within organizations have observed the critical role of social identity, noting that trust is influenced greatly by group boundaries.³⁰ The ombuds’ location within and among groups is both important and complicated.

THEORIES OF SOCIAL IDENTITY, GROUPS, AND OSCILLATION

Sociologists and psychologists have long examined the formation and function of social groups, emphasizing a key distinction between those groups of which an individual is a member, and those of which she is not. The former are “in-groups” and the latter “out-groups,”³¹ and these are often easily illustrated by considering one’s own identity: when the author resided in Minneapolis, fans of the local professional football team, the Minnesota Vikings, constituted an in-group. And fans of the Vikings’ rival, the Green Bay Packers of neighboring Wisconsin, constituted an out-group.

Group memberships are not always voluntary, of course. One can choose whether to support a given football team, or can change allegiance at whim (or in the case of the author’s young son, on the occasion of a playoff loss), while one cannot choose to alter easily memberships rooted in gender, ethnicity, nationality, profession, or religion. In the workplace, one’s position may confer multiple memberships (e.g., rank-and-file, union member, management, salaried), each with a distinct combination of implications concerning power and relationships with other in- and out-group members.

29. *Id.* at 226–27.

30. See Tom R. Tyler, *Why Do People Rely on Others? Social Identity and the Social Aspects of Trust*, in 2 *TRUST IN SOCIETY* 285, 295–97 (Karen S. Cook ed., 2001).

31. See Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 *SCI. AM.* 96, 98–101 (1970).

Social categorization, a related concept, describes the process whereby an individual perceives herself or others as members of any group and attributes meaning to these group memberships.³² Research suggests that the process of categorization often leads to assumptions of homogeneity among group members, as evidenced in most any political race, genocidal rampage, racist screed, or other descriptions of the “other.”³³

One of the most pernicious implications of categorization is the conception of a “scope of justice,” within which members of one’s own group are treated with respect and fairness, and are worthy of our sympathy.³⁴ While that may qualify as “pernicious,” consider those who are outside of the scope of justice: they suffer “moral exclusion,” which means they are treated differently, and may be worthy of condemnation. As Susan Opatow writes, “Those who are morally excluded are perceived as nonentities, expendable, or undeserving. Consequently, harming or exploiting them appears to be appropriate, acceptable, or just.”³⁵ This dynamic of moral exclusion may be seen between warring parties comprised of national or ethnic groups, or within the same small organization, through acts like microaggressions or microinequities.³⁶

Social identities can thus inform and influence individuals’ relationships, whether toward affinity or antipathy. Importantly, every individual occupies multiple groups, and thus one’s identity in any given context is a product of which group memberships are relevant or salient in that context.³⁷ One’s political affiliation is likely more salient to herself and others during an election season, for example. Within an organization, two individuals may share membership in the category ‘employee’ but may not share the same classification regarding ‘exempt’ or ‘non-exempt.’

32. S. Alexander Haslam, Penelope J. Oakes, John C. Turner, & Craig McGarty, *Social Identity, Self-Categorization, and the Perceived Homogeneity of Ingroups and Outgroups: The Interaction Between Social Motivation and Cognition*, in 3 HANDBOOK OF MOTIVATION AND COGNITION 182, 209–18 (Richard M. Sorrentino & E. Tory Higgins eds., 1996); John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 15, 17–21 (Henri Tajfel ed., 1982).

33. See EDWARD SAID, ORIENTALISM (1978) for a pioneering study of group representation and its effects.

34. Susan Opatow, *Drawing the Line: Social Categorization, Moral Exclusion, and the Scope of Justice*, in CONFLICT, COOPERATION, AND JUSTICE 347, 347–60 (Barbara Benedict Bunker et al. eds., 1995).

35. Susan Opatow, *Moral Exclusion and Injustice: An Introduction*, 46 J. OF SOC. ISSUES 1, 1 (1990).

36. See Chester M. Pierce, *Unity in Diversity: Thirty-Three Years of Stress*, in BLACK STUDENTS: PSYCHOSOCIAL ISSUES AND ACADEMIC ACHIEVEMENT 296 (Gordon LaVern Berry & Joy Keiko Asamen eds., 1989) <http://files.eric.ed.gov/fulltext/ED328624.pdf> (giving information on microaggressions); see Mary P. Rowe, Comment, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESP. & RIGHTS J. 153 (1990) (giving information on microinequities).

37. See Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. MGMT. REV. 20 (1989).

Identities and group memberships are critical to the sociological study of social movements, especially to the theory inconveniently titled “new social movements.”³⁸ In *Nomads of the Present*, Alberto Melucci examined the interests and motivations of individuals participating in these movements, noting that collective identity is built through a process of recognizing a goal, locating others interested in the same goal, and emotional investment among the resultant group.³⁹

Borrowing on the concept of movement actors as nomads, Robert Ratner and Andrew Woolford explored restorative justice efforts in British Columbia in an article entitled “Nomadic Justice.”⁴⁰ They coined the phrase “oscillating space” to describe the dynamic experienced by restorative justice providers, who needed to attend to their relationships to both government officers and activists outside (or actively opposed to) government.⁴¹ Referrals for restorative justice services and legitimacy flowed from the Crown Attorney (the prosecutor), while legitimacy and volunteer efforts flowed from community members who valued informal justice above governmental institutions.⁴² A similar dynamic has been recognized in the United States experience of community dispute resolution.⁴³

The organizational ombuds may find herself in just such an oscillating space with some frequency. By enacting the “most basic functions” listed previously—delivering respect, listening carefully, explaining information, reframing issues, helping visitors to develop and evaluate options—an ombuds is likely to be received or perceived as a visitor’s ally. Indeed, as employees of the same organization, or citizens within a shared organizational culture, ombuds and their visitors share a collective identity. And yet an ombuds may also be seen as a member of the organization’s management team, as she might report “to each senior officer on a regular basis about what comes to [the ombuds] about his or her domain,”⁴⁴ or communicate directly with the president or CEO about trends or systemic problems the ombuds has observed. Thus formal organizational leaders and ombuds may also share a group membership, perceived by others if not by the ombuds herself, as those who are responsible for the organization and furthering its interests. These competing conceptions have implications for the

38. “New social movements” are distinguished from conventional ones by their emphasis on cultural and social principles such as environmental protection or human rights, instead of primarily economic concerns. Scholars have characterized these movements as less organized and more often comprised of upper- and middle-class actors, than earlier labor movements.

39. ALBERTO MELUCCI, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* 30–36 (John Keane & Paul Mier eds., 1989).

40. See Woolford & Ratner, *supra* note 3.

41. *Id.* at 188.

42. *Id.* at 181.

43. Timothy Hedeon, *Institutionalizing Community Mediation: Can Dispute Resolution “of, by, and for the People” Long Endure?* 108 PENN. ST. L. REV. 265, 265 (2003).

44. Rowe & Gadlin, *supra* note 6, at 226.

operation of the ombuds office, as well as its relationship to broader dispute systems.

OMBUDS OSCILLATION AND DISPUTE SYSTEMS DESIGN

Dispute System Design is a field of practice committed to understanding and engaging constructively conflict within an organization or institution through stakeholder participation. Professors Stephanie Smith and Janet Martinez proposed an “Analytic Framework” through which to assess dispute systems:

“1. Goals

- a) Which types of conflicts does the system seek to address?
- b) What does the system’s designer seek to accomplish?

2. Processes and Structure

- a) Which processes are used to prevent, manage and resolve disputes?
- b) If there is more than one process, are they linked or integrated?
- c) What are the incentives and disincentives for using the system?
- d) What is the system’s interaction with the formal legal system?

3. Stakeholders

- a) Who are the stakeholders?
- b) What is their relative power?
- c) How are their interests represented in the system?

4. Resources

- a) What financial resources support the system?
- b) What human resources support the system?

5. Success and Accountability

- a) How transparent is the system?
- b) Does it include an evaluation component?
- c) Is the system successful?”⁴⁵

Of these dimensions, a few are highly relevant to understanding an organizational ombuds’ oscillating space: How are [stakeholders’] interests represented in the system? How transparent is the system? What human resources support the system?

Stakeholders’ interests

“Stakeholders may be the immediate parties in conflict, individuals or entities subsidiary to or constituents of those parties, or others directly or indirectly affected by the dispute’s outcome,”⁴⁶ and their participation in

45. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 133 (2009).

46. *Id.* at 131.

the design of a conflict management system⁴⁷ is thought to be necessary to ensure the resultant system's credibility. Organizational ombuds offices serve as "a designated neutral within a specific organization and provides conflict resolution and problem-solving services to members of the organization (internal ombudsman) and/or for clients or customers of the organization (external ombudsman)."⁴⁸ Thus to explore how an ombuds office represents stakeholders' interests requires identification of those interests.

An organization's proclaimed mission and values are expected to be broadly shared by all members of the organization, including the ombuds. Fair and respectful treatment is an anticipated characteristic of most every organization, too, and is often reflected and protected in policies and procedures. As observed earlier, an ombuds shares "a commitment to the mission and values of the organization [she] serves, yet [her] loyalty to the organization has to be subservient to principles of fairness and impartiality."⁴⁹

Contemporary organizational ombuds practice in the United States is marked by providing accessible, responsive, independent, and confidential services. These include respectful listening, access to relevant information, navigation to appropriate offices, coaching or other support to enhance a visitor's ability to address needs herself, and convening facilitated conversations or mediations.⁵⁰ While these are likely to be welcome services by an individual visitor, might they contradict others' interests? An examination of interests and approaches to conflict responses is needed.

Scholars of organizational dispute handling have identified a three-part framework to understand responses to conflict: power-based, rights-based, and interest-based.⁵¹ A power-based approach involves coercing an outcome, a rights-based approach relies on recognized or legitimate standards of fairness, and an interest-based approach is grounded in reconciling differences through negotiation or joint problem-solving. Most large organizations have offices related to each of these—consider that legal and compliance offices seek to protect rights, while formal supervision through a chain-of-command represents power, and employee assistance programs or counseling services support interests. Notably, an ombuds office has an "eclectic orientation" as it interacts with—and in turn, supports—resources rooted in any of the three approaches.⁵²

Sensitivity to a visitor's interests and rights, and recognition of her relative power, are common ombuds practices. The visitor is likely to per-

47. The terms "dispute system" and "conflict management system" are used interchangeably in the relevant literature.

48. *International Ombudsman Association FAQ*, INT'L OMBUDSMAN ASS'N, <https://www.ombudsassociation.org/Resources/Frequently-Asked-Questions.aspx> (last visited Feb. 16, 2016).

49. Rowe & Gadlin, *supra* note 6, at 211.

50. *Id.* at 225–28.

51. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 4–10 (1988).

52. Rowe & Gadlin, *supra* note 6, at 213.

ceive the ombuds as interested in the visitor's experience and views, and committed to fairness for the visitor ("Ombuds regularly offer referrals to rights- and power-based options, as well as offering interest-based options. Above all [ombuds] focus on fair process"⁵³), and thus may identify the ombuds as a fellow member of the visitor's in-group. A front-line employee seeking to protect his rights, which he perceives to be disregarded by the organization, will find support through the ombuds, just as will a high-level manager seeking to have her power recognized by subordinates.

Given the ombuds' impartiality toward all constituents, any individual—including one whose behavior motivated the visitor to seek out the ombuds—is likely to consider the ombuds an in-group member, too. This highlights the potential value of an impartial or neutral stance, as the ombuds may assist any parties—even those in conflict with each other—given the office's neutrality. And yet, what happens when the interests (or rights or power) of a visitor run contrary to the interests of the organization?

Most organizational ombuds provide informed summaries of organizational culture, frequent problems, or categories of visitors' concerns; this is called "upward feedback."⁵⁴ Whether provided privately to a chief executive, publicly through an annual report, or selectively to relevant managers, such feedback does not include any individual-identifying information. The primary interest is to provide the organization valuable feedback, on which leadership or others can act. In this capacity, the ombuds may be understood to represent the interests of the organization.

Transparency

Ombuds offices are unique among organizations' dispute responses. As conflict is seen "in most organizations . . . primarily as something that interferes with efficient functioning and therefore has to be 'managed,'"⁵⁵ organizations developed "conflict-resolving" elements such as mediation or arbitration, or "conflict-anticipatory" practices like training to build capacity, or open-door policies to lower barriers to raising issues. Thus, organizational ombuds tend to be "conflict-tolerant." To realize the greatest benefits of conflict, sometimes it is best to "stay with it."⁵⁶ Ombuds maintain vigilant observation of their organization's culture and constituents, initiate informal inquiries, and support visitors in seeking appropriate responses to conflict.

53. *Id.* at 213–14.

54. *Id.*

55. *Id.* at 211.

56. See BERNARD MAYER, *STAYING WITH CONFLICT* (2010); see Dean Tjosvold, *The Conflict-Positive Organization: It Depends Upon Us*, 29 J. ORGANIZATIONAL BEHAV. 19 (2008).

To accomplish these actions while respecting visitors' privacy and anonymity, the work of organizational ombuds is confidential.⁵⁷ In introducing the Analytic Framework presented above, its authors observe, "[t]ransparency increases credibility and therefore participation, and encourages further feedback from participants to system operators."⁵⁸ How might one reconcile the need for confidentiality with the value of transparency, especially given the unique qualities of the ombuds role?

Ombuds offices are often chartered or established with "terms of reference" to define the office's role and services. The International Ombudsman Association provides a best practices reference on office charters, explaining that these "establish a shared understanding of how the office will function within the organization."⁵⁹ Regarding the ombuds' jurisdiction and authority, IOA notes that charters should include provisions about initiating informal inquiries, accessing relevant information, accessing legal counsel, recusal due to conflict of interest, determining what information to share with a visitor, and withdrawal from cases at the ombuds' discretion.⁶⁰

The last of these provisions, that an ombuds may withdraw from a concern, flows from Standard of Practice 1.3: "The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time."⁶¹ The ombuds is not required to advise a visitor or others of her withdrawal. One may wonder whose interests are served by the exercise of this discretion—the visitor's, the organization's, both, or neither—yet presumably such inaction is aligned with the ombuds' responsibilities for fairness and impartiality.

The preceding provision, that an ombuds determines what information to share with a visitor, reflects not transparency but optional opacity, or perhaps "qualified transparency."⁶² Given that Standard 3.2 addresses ombuds privilege—"Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privi-

57. See *IOA Standards of Practice*, *supra* note 5 (discussing the eight standards related to Confidentiality in greater length and detail than the other three sets of standards).

58. Smith & Martinez, *supra* note 45, at 133.

59. *Best Practices: Ombudsman Office Charters*, INT'L OMBUDSMAN ASS'N, http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Charter-Best-Practices_2.pdf (last visited Feb. 16, 2016).

60. *Id.*

61. *IOA Standards of Practice*, *supra* note 5.

62. The term *qualified transparency* is not novel, despite the author's uninformed hope that it might be. Proposing a system to allow confidential administrative review of internet providers' roles as intermediaries between information consumers and information, Pasquale introduced this term in Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 Nw. U. L. REV. 105 (2010).

lege”—information gathered in the course of inquiry may be shared or withheld based on the ombuds’ judgment.

Human resources supporting the system

Organizational ombuds offices are not, theoretically, conflict management systems. They often function as a component of such systems, or a coordinator of such systems.⁶³ Other processes frequently found in such systems include mediation, grievance hearings, and arbitration. Each of these are conducted by individuals who adopt a stance of impartiality, striving to provide a forum to allow parties (in mediation) or documentation/evidence (in hearings or arbitration) to speak for themselves. In many cases, these individuals are brought in from outside the organization, serve in these roles only temporarily to address the issue at hand, or both.

Highlighting the distinction between the ombuds role and other conflict management roles, Howard Gadlin coined the title *inside outsiders* to describe the ombuds position.⁶⁴ Noting that ombuds are in the employ of their organization, familiar with the organization’s culture, and familiar to its constituents, he considers them insiders.⁶⁵ And emphasizing that ombuds seek to take a broad view—across the entire organizational chart, throughout all levels of employment, and over time—for the benefit of providing upward feedback, they are at once outsiders, too.⁶⁶

CONCLUSION: PERPETUAL OSCILLATION IS FORESEEN

As demonstrated across the literature of ombuds theory and practice and detailed in the preceding pages, the contemporary organizational ombuds is at once a dispute resolution practitioner, “an odd duck,” and “an inside outsider.” The ombuds’ social identity parallels the very purpose of an organizational ombuds office, which recognizes the dynamic nature of conflict. Relationships demand the continuous management of all parties’ interests, and conflict emerges when interests are seen to diverge. That an ombuds works closely with constituents in seeking fair and equitably administered processes requires her to identify with both the visitor *and* the organization, perhaps alternating emphasis even within the span of a short conversation.

The IOA Standards of Practice close with Standard 4.8, “The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman

63. Mary Rowe, *An Organizational Ombuds Office in a System for Dealing with Conflict and Learning from Conflict, or “Conflict Management System”*, 14 HARV. NEGOT. L. REV. 279, 279 (2009).

64. Howard Gadlin & Elizabeth Walsh Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEGOT. J. 17, 19 (1997).

65. *Id.*

66. *Id.*

Office.”⁶⁷ That trust is grounded (at least in part) in a visitor’s perception of the ombuds as a fellow in-group member, concerned with fair treatment of others with a shared scope of justice. And that trust is also enjoyed from organizational leadership, with whom the ombuds shares upward feedback in the interests of organizational learning. As the ombuds strives to maintain the trust of these sometimes-divergent interests, her identity oscillates between these groups. Like nomads anywhere, the ombuds’ identity is always in motion.

67. IOA *Standards of Practice*, *supra* note 5.